(13)

No. 90-1102

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT E. GIBSON,

Petitioner,

v.

THE FLORIDA BAR, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

I. BECAUSE COLLECTING COMPULSORY BAR DUES COMPELS ASSOCIATION AND TAKES PROPERTY, ADVANCE REDUCTION TO EXCLUDE UNDENIABLY NONCHARGEABLE AMOUNTS IS REQUIRED BY FIRST-AMENDMENT DUE PROCESS

Two courts of appeals have held "that advance reductions of agency shop fees are required by *[Teachers Local 1 v.] Hudson* [, 475 U.S. 292 (1986),] even where the agency fee procedure includes an escrow of 100% of the collected agency fees." *Grunwald v. San Bernardino City School Dist.*, 917 F.2d 1223, 1227-28 (9th Cir. 1990) (2-1 decision); *accord Damiano v. Matish*, 830 F.2d 1363, 1369-70 (6th Cir. 1987); *Tierney v. City of Toledo*, 824 F.2d 1497, 1502-04 (6th Cir. 1987). A third court of appeals also has interpreted *Hudson* as requiring an advance reduction, as the Brief for Respondents at 6 n.3 concedes. *See Dashiell v. Montgomery County*, 925 F.2d 750, 754, 756 (4th Cir. 1991).[1] Nonetheless, respondent Florida Bar and its *amici* National Education Association, *et al.* ("NEA"), argue that "[n]owhere in *[Hudson]* is there a requirement for an escrow *and* an advance reduction." Respondents' Brief at 5; *accord* NEA's Brief at 7.

The Bar acknowledges, Respondents' Brief at 4, as it must, that *Hudson*, 475 U.S. at 309 (emphasis added), said that the "appropriately justified *advance reduction* * * * *[is] necessary* to minimize both the impingement [of the agency shop on employees' first-amendment interests] and the burden" of objection. The Bar and NEA misread that clear holding as saying only that nonmembers must be provided adequate information. Respondents' Brief at 4-5; NEA's Brief at 7-8. However,

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[1] *See also In re Chapman*, 128 N.H. 24, 40, 509 A.2d 753, 764-65 (1986) (Souter, J., concurring) (citing *Hudson* for the proposition that one way to avoid the violation of first-amendment rights caused by use of compulsory bar dues for lobbying "would be to require the Association to provide a mechanism for a *reduction in dues* reflecting the extent to which the lobbying is not germane or reasonably related to those responsibilities approved in *Lathrop" v. Donohue*, 367 U.S. 820 (1961)) (emphasis added).

"advance reduction," not "appropriate justification," is the *subject* of the Court's sentence. As did the courts of appeals in *Grunwald*, *Damiano*, and *Tierney*, petitioner presumes that this Court means what it says.

Moreover, advance reduction is essential to fulfillment of the principles on which *Hudson* rests. The Bar and NEA argue that only spending of compulsory dues and fees, not collection, gives rise to constitutional concerns. Respondents' Brief at 12-13; NEA's Brief at 8-9. They thus ignore two teachings of *Hudson*.

First, although "a 100% escrow completely avoids the risk that dissenters' contributions could be used improperly," additional procedural safeguards "are required because *the agency shop itself* impinges on the nonunion employees' First Amendment interests." *Hudson*, 475 U.S. at 309 (emphasis added). But, if the agency shop impinges on first-amendment rights even with no risk of improper spending, then not only spending constitutes the infringement, but also collection. Consequently, *Hudson*, 475 U.S. at 310 (emphasis added), enunciated "constitutional requirements for the Union's *collection* of agency fees," not just "'a way of preventing compulsory subsidization of ideological activity,'" *id.* at 302 (quoting *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 237 (1977)).

The Brief for Petitioner at 12-13 notes that "a likely consequence of the compelled financial exaction" was identified in *Elrod v. Burns*, 427 U.S. 347, 355-56 (1976) (plurality opinion), and other cases as the inability of the individual to use those funds for his own causes. *See Rutan v. Republican Party*, 110 S. Ct. 2729, 2734 (1990). Twisting that ancillary point, the Bar and NEA disingenuously suggest that petitioner argues that "any excessive collection of money" under color of law "gives rise to a First Amendment claim." NEA's Brief at 11-12; *accord* Respondents' Brief at 13-14. That is *not* petitioner's contention.

The taking of property to pay civil damages or taxes, or serve other governmental purposes "having nothing to do with" first-amendment conduct at all, as in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705-07 (1986), cited in the NEA's Brief at 11, does not give rise to a first-amendment claim simply because it "will have

some effect on the First Amendment activities of those subject to" the taking. However, that is not this case.

Here, the taking of property gives rise to a first-amendment claim *because* the taking *serves goals that themselves infringe upon first-amendment freedoms*, as in *Elrod*, *Abood*, *Hudson*, and *Keller v. State Bar*, 110 S. Ct. 2228 (1990). The first-amendment infringement inherent in the taking in these cases is forced association with a political party, union, or professional organization through the coerced collection of party contributions, agency fees, or bar dues. *See Keller*, 110 S. Ct. at 2236; *Hudson*, 475 U.S. at 301-02 & nn.8-9; *Elrod*, 347 U.S. at 355.[2] The inability of the individual to use those funds for his or her own expressive and associational purposes is an *additional* effect of the forced association recognized in *Elrod*, 427 U.S. at 355-56, and the other cases cited in Petitioner's Brief at 12-13. *See* Yelin, *Constitutional Considerations Affecting the Methods of Exacting Union "Fair Share" Collective Bargaining Fees from Non-Member Public Employees*, 1985 Det. C.L. Rev. 767, 790-91.

When free association is infringed, even if only partially, as by the contribution limitations in *Buckley v. Valeo*, 424 U.S. 1, 22-23 (1976), the infringement may be sustained only "if the State demonstrates a sufficiently important interest and employs means *closely drawn* to avoid *unnecessary* abridgment of associational freedoms." *Id.* at 25 (emphasis added). In *Abood*, *Hudson*, and *Keller*, the Court found such a state interest, but only to the extent that compulsory fees are limited to the costs of certain functions of a union or integrated bar *and* are collected with certain "carefully tailored" procedural safeguards. *Hudson*, 475 U.S. at 302-03; *see Keller*, 110 S. Ct. at 2236-37.

"Careful" or "narrow tailoring" does not "require elimination of *all* less restrictive alternatives." *Board of Trustees v. Fox*, 492 U.S. 469, 478 (1989) (emphasis added). However, it does "require the government goal to be substantial, and the cost to

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[2] "Compelled support of a private association is fundamentally different from compelled support of government." *Abood*, 431 U.S. at 259 n.13 (Powell, J., concurring in judgment); *see Buckley v. Valeo*, 424 U.S. 1, 91 & n.124 (1976).

be *carefully* calculated. Moreover, since the State bears the burden of justifying its restrictions, it must *affirmatively establish* the reasonable fit" between the restrictions and the state's objective. *Id.* at 480 (emphasis added) (citation omitted).

Second, in "this context, the procedures required by the First Amendment also provide the protections necessary for any deprivation of property." *Hudson*, 475 U.S. at 304 n.13. The Bar ignores this fact; the NEA dismisses it lightly, *see* NEA's Brief at 12 & n.10. However, even if the deprivation is only temporary, "[d]etermining the adequacy of predeprivation procedures requires consideration of the Government's interest in imposing the temporary deprivation, the private interests of those affected by the deprivation, the risk of erroneous deprivations through the challenged procedures, and the probable value of additional or substitute procedural safeguards." *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 262 (1987) (plurality opinion).

Escrow without advance reduction satisfies neither first-amendment careful tailoring nor the due-process test, particularly in this case. There "are practical reasons why '*[a]bsolute* precision' in the calculation of the charge to nonmembers cannot be 'expected or required,'" *Hudson*, 475 U.S. at 307 n.18 (quoting *Railway Clerks v. Allen*, 373 U.S. 113, 122 (1963)) (emphasis added). Nonetheless, *some* meaningful degree of "'[p]recision * * * must be the touchstone' in the First Amendment context." *Id.* at 303 n.11 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)). Collection of monies that indisputably will not be used for lawfully chargeable activities, even if escrowed and later rebated, is inherently *im*precise. It thus violates the first amendment, because it is a means "substantially broader than necessary to achieve the government's interest," *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989), in seeing that all attorneys or employees subsidize only chargeable activities.[3]

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[3] The NEA's Brief at 12 & n.9, 21-22, citing *Ward*, argues that collecting more money does not "substantially" increase the infringement upon associational freedom. *Ward*, 491 U.S. at 801-02, equates "substantial" with "material." Coerced payment of monies to which a bar or union is *not* entitled, regardless of the amount, is a materially greater infringement on the individual's associational freedom than payment of monies to which the organization is arguably entitled.

Collection of nonchargeable amounts also denies due process. It presents a *certainty* of erroneous deprivation. And it adversely affects the individual's interests, not just in having more money, as the NEA's Brief at 13 n.10 says, but also in not associating with a bar or union more than necessary to serve the state's interest in mandatory association and in "us[ing h]is property for his own preferred political, ideological or other elected purposes." *Damiano*, 830 F.2d at 1370.

Moreover, in this case, the lack of advance reduction and pre-collection notice "inevitably" permits the Bar to *spend* a dissenting attorney's dues on constitutionally nonchargeable purposes before any funds are escrowed, as Respondents' Brief at 11 concedes. *See* Petitioner's Brief at 21-22. Indeed, under the plan approved by the lower courts in this case, that deficiency exists throughout the fiscal year, because the Bar escrows *only* "the pro rata amount of the objecting member's dues at issue" under "a written objection to a particular position on a legislative issue." Petition Appendix ("P.A.") 6a n.8.[4]

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[4] Respondents' Brief at 4 (footnote omitted) asserts, without record support, that in "administering its rule, the Bar makes a 100% escrow of each dissenting member's pro rate [*sic*] share of the entire legislative budget." As in *Hudson*, 475 U.S. at 305 n.14, this Court should "consider the procedure as it was presented to the District Court." Here, there is a particularly acute "fear that a defendant would be 'free to return to his old ways'" which "dictate[s] that [the Court] review the legality of the practice defended before the District Court," *id.* (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953)). The Bar apparently has escrowed an objector's pro rata portion of its entire legislative program only "[p]ending implementation of a method to specifically allocate costs attributable to each legislative position." Letter from John F. Harkness, Jr., Executive Director, Florida Bar, to David P. Frankel (May 24, 1989) (Frankel *Amici* Brief 54a-55a); *see Official Notice*, The Florida Bar News, Oct. 15, 1990, at 4 (Frankel *Amici* Brief 19a). The Bar's amended rule promulgated on March 26, 1991, still provides for escrow of *only* "the pro rata amount of the objecting member's dues at issue" under "a written objection to a particular position on a legislative issue." Frankel *Amici* Brief 61a-62a. **[cont'd]**

The Bar argues that this "problem would exist as well with an advance reduction," because it might make unanticipated nonchargeable expenditures. Respondents' Brief at 11. However, that advance reduction might prevent only most impermissible spending is no reason to dispense with the reduction and permit even greater, irreparable invasion of first-amendment rights. Nor is payment of interest on rebates a constitutionally adequate alternative, as the Bar and NEA urge, Respondents' Brief at 11-12; NEA's Brief at 18 n.15. The harm is only reduced, not cured, by interest. *Ellis v. Railway Clerks*, 466 U.S. 435, 443-44 (1984).

Advance reduction does not restrict the organization's ability to require everyone to contribute to lawfully chargeable costs, as the Bar and NEA ritualistically assert, because only *non*-chargeable costs are excluded by the reduction. The sole rationalization the Bar and NEA advance for not providing an advance reduction is that it imposes administrative and financial burdens on them. Respondents' Brief at 6-11; NEA's Brief at 13 n.10.[5] However, "administrative convenience alone is insufficient to make valid what otherwise is a violation of due process of

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Moreover, even escrow of a pro rata portion of the entire legislative program is unlikely to avoid impermissible spending. As the Respondents' Brief at 4 n.2 concedes, the Bar's "*Abood* obligations are not limited to legislative expenditures." The Bar misrepresents the record in asserting that petitioner's claims in this action are limited to legislative expenditures. *See infra* p. 18.

[5] The Bar and its *amici* accuse petitioner and other dissenting individuals, and their counsel, of acting "in bad faith" and seeking "to bind all organizations which utilize compulsory dues or agency fees in a procedural straight jacket" in urging the courts to require advance reduction and the other procedural safeguards at issue in this case. Respondents' Brief at 18, 21, 24; *see* NEA's Brief at 23-24; Brief of Wisconsin Bar at 13. Those *ad hominem* attacks are inappropriate and unprofessional: "the exercise • • • of First Amendment rights to enforce constitutional rights through litigation, *as a matter of law, cannot be deemed malicious*." *NAACP v. Button*, 371 U.S. at 440 (emphasis added). Do the Bar and its *amici* think that the federal courts which have applied *Hudson* to require advance reduction and advance notice, and permit general objections, did so only to "hamstring" unions and bar associations?

law," *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 647 (1974); "[n]or is additional expense occasioned by [meeting the ordinary standards of due process] sufficient to withstand the constitutional requirement." *Bell v. Burson*, 402 U.S. 535, 540-41 (1971). Therefore, "the procedures mandated by *Hudson* are to be accorded all nonmembers of agency shops [or attorneys] regardless of whether the union [or bar] believes them to be excessively costly." *Andrews v. Education Ass'n*, 829 F.2d 335, 339 (2d Cir. 1987); *accord Lowary v. Lexington Local Bd.*, 903 F.2d 422, 431 (6th Cir.), *cert. denied*, 111 S. Ct. 385 (1990).

In any event, the burdens conjured up by the Bar and its *amici* are spurious. *Hudson*, 475 U.S. at 307 n.18, contemplates calculation and pre-collection notice of an advance reduction based on "expenses during the preceding year." The Bar concedes that "is workable with an organization that has a stable relative allocation of funds between chargeable and nonchargeable uses from year to year." But it claims that it cannot do so, "since the apportionment of The Florida Bar's budget one year affords no predictability as to future years." Respondents' Brief at 9. In fact, the portions of the Bar's budget spent on line items likely to contain nonchargeable expenses are relatively stable from year to year.[6]

Certainly, the Bar's spending fluctuates no more significantly than a union's, since the allocation of a union's expenses depends upon the political and contract-negotiation cycles, as well as the "exigencies of the legislative process" on which Respondents'

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[6] Selected programs as a percentage of dues as reported in *The Florida Bar Journal*, Sept. 1986, at 29-30, Sept. 1987, at 36-37, Sept. 1988, at 29-30, Sept. 1989, at 30-31, Sept. 1990, at 26-27:

Program	1986-87	1987-88	1988-89	1989-90	1990-91
Journal & News	4.5%	3.8%	0.9%	3.6%	3.6%
Public Information	5.9%	7.4%	7.2%	7.4%	6.6%
Public Interest Programs	4.9%	4.7%	4.9%	4.5%	3.9%
Legislation	4.2%	5.4%	4.5%	5.4%	4.4%
TOTAL	19.5%	21.3%	17.5%	20.9%	18.5%

Brief at 11 relies.[7] While recognizing that "the proportion of the union budget devoted to political activities may not be constant," this Court has held, since *Allen*, 373 U.S. at 122-23 & n.8 (emphasis added), that a dissenting nonmember is *"entitled" to "a reduction of future * * * exactions* from him by the same proportion" that nonchargeable expenses bear to total expenses. *Hudson*, 475 U.S. at 307 n.18, suggests that the most practical and fairest way of calculating that amount is on the basis of the prior year's expenditures.[8] Since *Hudson*, several unions have implemented such an advance reduction with no apparent undue burden. *See, e.g., Andrews*, 829 F.2d at 337-38 (2d Cir. 1987); *Jibson v. Michigan Educ. Ass'n*, 719 F. Supp. 603, 606 (W.D. Mich. 1989); *Cramer v. Matish (UAW)*, 705 F. Supp. 1234, 1236-37 & n.6 (W.D. Mich. 1988), *modified on other grounds*, 924 F.2d 1057 (6th Cir. 1990) (table); *Hohe v. Casey (AFSCME)*, 695 F. Supp. 814, 815 (M.D. Pa. 1988), *aff'd*, 868 F.2d 69 (3d Cir.), *cert. denied*, 110 S. Ct. 144 (1989).[9]

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[7] The Court can take judicial notice that most elections occur in a two- or four-year cycle. A recent survey found that 80% of collective-bargaining contracts have three-year terms, and 9% have two-year terms. Bureau of Nat'l Affairs, *Basic Patterns in Union Contracts* 1 (12th ed. 1989).

[8] Fluctuations in expense patterns are likely to average themselves out over a period of years. *Allen*, 373 U.S. at 123 n.8, and *Keller*, 110 S. Ct. at 2237, suggest that an advance reduction might be based on a projected budget. However, that would be a less reliable way to avoid the risk of excessive collection and impermissible spending, because nothing prevents a bar or union from overstating its projected chargeable expenditures out of self-interest.

[9] Advance reduction does not impose a peculiar undue burden on teachers' unions, as the dissent in *Grunwald*, 917 F.2d at 1232 & n.4, assumed. At least three NEA state affiliates have implemented plans under which pre-collection notice of a reduced fee is given to all nonmembers after the school year begins. *See Andrews*, 829 F.2d at 337-38; *Lehnert v. Ferris Faculty Ass'n*, 707 F. Supp. 1490, 1496-97 (W.D. Mich.), *aff'd*, 893 F.2d 335 (6th Cir. 1989), *cert. denied sub nom. Lindsey v. Ferris Faculty Ass'n*, 110 S. Ct. 2586 (1990); *Lowary v. Lexington Local Bd.*, 704 F. Supp. 1456, 1474-75 (N.D. Ohio 1988), *modified on other grounds*, 903 F.2d 422 (6th Cir.), *cert. denied*, 111 S. Ct. 385 (1990).

II. ADVANCE NOTICE *EXPLAINING THE BASIS FOR THE CHARGEABLE SHARE* IS REQUIRED TO FACILITATE OBJECTIONS AND ENSURE DUE PROCESS, EVEN IF THE ENTIRE FEE IS ESCROWED

Hudson, 475 U.S. at 306 (emphasis added), held a union's procedure constitutionally "inadequate because it provided nonmembers with inadequate information *about the basis for the proportionate share"* of dues that they were required to pay. Revealingly, the Bar does not argue that it provides attorneys with *any* information about the basis for the proportionate share of dues that they are required to pay if they object to subsidizing more than the Bar's costs of "regulating the legal profession and improving the quality of legal services," *Keller*, 110 S. Ct. at 2236. Instead, the Bar asserts that it "does not * * * leave the membership 'in the dark about the source of the figure' *for dues*." Respondents' Brief at 23-24 (emphasis added).

However, *Hudson* requires disclosure of *relevant*, not irrelevant, financial information. The data needed by "potential objectors"—and the disclosure mandated by *Hudson*, 475 U.S. at 306-07—is information "identifying the expenditures for [activities] * * * for which [objectors] can fairly be charged a fee" under the first amendment. Here, to decide intelligently whether they wish to object, attorneys need an identification of the expenditures that the Bar considers constitutionally chargeable under *Keller*. The Bar need not disclose "an exhaustive and detailed list of all its expenditures," *Hudson*, 475 U.S. at 307 n.18; but its disclosure nevertheless must be "sufficient to satisfy the First Amendment concerns in this context." *Id.* at 306 n.17. Neither of the ways in which the Bar argues that it meets those concerns is sufficient under *Hudson* and *Keller*.

The Bar first claims that "the formal notice of all legislative positions taken by it" apprises members "of all there is to know about it ideologically and financially." Respondents' Brief at 23. However, under the Bar's procedure, it gives only "notice of adoption of legislative positions in The Florida Bar News." The Bar does not determine the pro rata amount of dues allocable to those positions, or whether it will treat them as chargeable or

not, unless and until *after* a member objects. P.A. 6a n.8.[10] The Bar cites no record reference supporting its claim that the notice provides financial information; in fact the notice does not. *See* Frankel *Amici* Brief 17a-19a. Thus, the Bar's scheme, both on its face and as applied, is contrary to the holding of *Hudson*, 475 U.S. at 306, that "requiring [potential objectors] to object in order to receive information—does not adequately protect the careful distinctions drawn in *Abood*."

The Bar also argues that it "provides its members with full information on *all* budgeted expenditures." Respondents' Brief at 24. However, the budget categories disclosed are too broad to be useful. *See* Joint Appendix ("J.A.") 62. The Bar admits that "[n]one of these categories is a nonchargeable use per se." Respondents' Brief at 7. Thus, the Bar concedes that many of its budget categories include *both* chargeable and nonchargeable expenses, and that "it does not classify the budgeted amounts as chargeable and nonchargeable and does not provide the percentage of dues apportioned to each." *Id.* at 24; *see id.* at 4 n.2. But precisely that classification is required by *Hudson*, 475 U.S. at 307 n.18 (emphasis added) (cross-reference omitted):

> With respect to an item *such as* the Union's payment * * * to its affiliated state and national labor organizations, *for instance*, either a *showing that none* of it was used to subsidize activities for which nonmembers may not be charged, or an *explanation of the share that was* so used was surely required.

With the exception of the panel majority below, the federal courts have uniformly applied *Hudson* as holding that, "in its initial explanation to nonunion employees, the union must break its expenses into major descriptive categories and *disclose those categories or portions thereof which it is including in the fee to be charged*." *Dashiell*, 925 F.2d at 756 (emphasis added); *see, e.g., Schneider v. Colegio de Abogados de Puerto Rico*, 917 F.2d 620,

[10] As that is the scheme the lower courts approved in this case, P.A. 8a, this Court should review its constitutionality in that form. *See supra* p. 5 note 4.

634-35 & n.22 (1st Cir. 1990), *petitions for cert. filed on other grounds*, 59 U.S.L.W. 3674, 3754 (U.S. Mar. 20, Apr. 25, 1991) (Nos. 90-1470, -1651); *Tierney*, 824 F.2d at 1504.[11]

Moreover, the NEA's Brief at 15 n.12 (quoting *Hudson*, 475 U.S. at 306-07), is wrong in arguing that the "only 'explanation' required by *Hudson* is an 'identif[ication]' of the major categories of expenditures that the union views as chargeable or nonchargeable." *Hudson*, 475 U.S. at 307 & n.18 (emphasis added), also mandates "adequate disclosure of *the reasons why* [potential objectors are] required to pay their share." Merely disclosing that, for example, the Bar considers chargeable a percentage of its expenditures for "Legislation" would not tell the member which *kinds* of legislation the Bar views as "germane" to "regulating the legal profession and improving the quality of legal services," *Keller*, 110 S. Ct. at 2236. That too must be explained.

The Bar argues that "the difficulty in categorizing matters as either within or outside the constitutional purview for compulsory dues funding" justifies its failure to provide advance notice of

[11] *Hudson*, 475 U.S. at 307 n.18, also held that "adequate disclosure surely would include * * * verification by an independent auditor." *See id.* at 310. The NEA's Brief at 15 n.12 cites cases holding that "the role of the independent auditor under *Hudson* is *not* to make the legal determination of whether particular expenditures are or are not legally chargeable." However, those cases do not hold that the identification of chargeable and nonchargeable expenses need not be independently verified *in any sense*, as the NEA implies, and Respondents' Brief at 23 assumes. "The verification requirement compels the union to have an independent auditor determine whether the amounts claimed by the union *for chargeable activities* are true." *Dashiell*, 925 F.2d at 756 (emphasis added). This requirement is not satisfied by audits of regular financial statements which do not allocate expenses as chargeable or not. *Mitchell v. Los Angeles Unified School Dist.*, 744 F. Supp. 938, 940-41 (C.D. Cal. 1990); *Hohe v. Casey*, 727 F. Supp. 163, 165-67 (M.D. Pa. 1989). An audit of such an allocation does not require the auditor to make legal determinations. *Mitchell*, 744 F. Supp. at 941 n.4. Because the Bar discloses absolutely no independent verification of chargeable expenses, and because the record is devoid of evidence on the issue of what accountants can or must do in conducting an audit, the Court need not here address the scope of an auditor's role in providing the independent verification of chargeable expenses required by *Hudson*.

which expenditures it considers chargeable. Respondents' Brief at 22-23; *see id.* at 10. That same "difficulty" existed for public-employee unions when *Hudson* was decided. *See Abood*, 431 U.S. at 236-37. Nonetheless, *Hudson*, 475 U.S. at 306 & n.17, held that making and disclosing the initial categorization "does not impose an undue burden on the union," because "[b]asic considerations of fairness, as well as concern for the First Amendment rights at stake," dictate that the union, not the individual, bear that burden. And, *Keller* found unpersuasive the contention that undertaking an "'*Ellis* analysis'" to determine which expenditures are chargeable and giving the explanation required by *Hudson*, in addition to preparing a regular budget, "'would create "an extraordinary burden" for the bar * * * .'" Any "'additional burden or inconvenience is hardly sufficient to justify contravention of the constitutional mandate.'" *Keller*, 110 S. Ct. at 2237 (quoting with approval *Keller v. State Bar*, 47 Cal. 3d 1152, 1192, 255 Cal. Rptr. 542, 568, 767 P.2d 1020, 1046 (1989) (Kaufman, J., dissenting)).

Adequate notice entails timeliness as well as sufficient information. Every court of appeals, other than the panel majority in this case, that has addressed the issue has held not only that a union or bar must shoulder the "burden" of giving the notice required by *Hudson* to all individuals paying compulsory fees, but also that the notice "must be given * * * *before* any fees may be collected." *Grunwald*, 917 F.2d at 1228; *accord Dashiell*, 925 F.2d at 754; *Dean v. TWA*, 924 F.2d 805, 808 (9th Cir. 1991); *Tierney*, 824 F.2d at 1503; *see Schneider*, 917 F.2d at 634. Two of those decisions require advance notice even though the union escrowed 100% of the fees upon collection. *Grunwald*, 917 F.2d at 1228; *Tierney*, 824 F.2d at 1505-06. The NEA's Brief at 17-20 argues that those cases are erroneous, because, it says, as long as a challenger's full fee is escrowed and notice precedes the hearing, which need not occur before fees are collected, "there is no reason why *notice* must be sent before collection begins."

But, because advance reduction is required, pre-collection notice is necessary to enable an individual to pay only the reduced amount determined by the bar or union and, unless the entire amount collected is automatically escrowed, to trigger

escrow of the disputed portion if he wishes to challenge that calculation. In short, advance notice *always* avoids some excessive collection, and *in this case*, impermissible spending as well. Because the Bar's scheme contemplates impermissible spending before any monies are put in escrow, it cannot be sustained even under the NEA's argument. *See supra* pp. 5-6.

Moreover, the premise for the NEA's argument is false. The purpose of notice is not *only*, in general under the due process clause, to apprise an affected individual of an impending hearing, or in specific under *Hudson*, "to enable individuals to file objections which will prevent the spending of their money on nonchargeable activities and, if they wish, to challenge the amount of the fee before an impartial decisionmaker." NEA's Brief at 19-20. Notice also serves other constitutional purposes.

In general, "a purpose of procedural due process is to convey to the individual a feeling that the government has dealt with him fairly, as well as to minimize the risk of mistaken deprivations of protected interests." *Carey v. Piphus*, 435 U.S. 247, 262 (1978); *accord Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195 n.14 (1985). Taking an individual's property without at least first giving him notice of the grounds for the taking, and that he will later have an opportunity to challenge those grounds, conveys precisely the opposite conviction. It thus is contrary to *Hudson*'s goal of "insur[ing] that the government treads *with sensitivity* in areas freighted with First Amendment concerns." 475 U.S. at 303 n.12 (emphasis added). *Cf. Barry v. Barchi*, 443 U.S. 55, 65 (1979) (a procedure under which a horse trainer's license was suspended without a pre-suspension hearing did not deny due process, because, *inter alia*, "he was immediately notified of the alleged drugging [and] 16 days elapsed *prior to* the imposition of the suspension") (emphasis added).[12]

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[12] Neither case cited by the NEA's Brief at 20 supports its argument that due process never requires notice prior to a taking if a pre-taking hearing is unnecessary. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14-15 (1978) (emphasis added), held that notice "does not comport with constitutional requirements when it does not advise the customer of the availability of a

In specific, a purpose of the procedural safeguards required by *Hudson*, 475 U.S. at 307 n.20, is to "facilitate a nonunion employee's ability to protect his rights." Collection of a compulsory fee without prior notice of its basis "present[s] the deprived party with a *fait accompli*" that discourages, rather than facilitates, challenges to the fee. *See Gilpin v. AFSCME*, 643 F. Supp. 733, 737 (C.D. Ill. 1986). As a scholar pointed out before *Hudson*, "to effectuate fully the goals underlying *Abood*," a union should be required to make a schedule of yearly disbursements "available for inspection by all employees * * * *before* an employee has parted with his money," because there "will thus be more assurance that inertia will not persuade a dissenter to relinquish his constitutionally protected right to freedom of association." *The Supreme Court, 1976 Term*, 91 Harv. L. Rev. 70, 198 (1977) (quoted with approval in *Galda v. Bloustein*, 686 F.2d 159, 168 n.16 (3d Cir. 1982)).

In sum, the information now disclosed by the Bar does not give an attorney "a *fair* opportunity to identify the impact of the governmental action on his interests and to assert a meritorious First Amendment claim," *Hudson*, 475 U.S. at 303 (emphasis added); and only a *pre*-collection notice of the kind mandated by *Hudson* would.

III. THE BAR'S MULTIPLE OBJECTION REQUIREMENT IS A NAKED, AND CONSTITUTIONALLY IMPERMISSIBLE, ATTEMPT TO SHIFT THE INITIAL BURDEN OF DESIGNATING WHICH ACTIVITIES ARE CHARGEABLE OR NOT TO THE POTENTIAL OBJECTOR

Respondents' Brief at 17 characterizes the Bar's requirement that attorneys object to specific issues every time it takes a

procedure for protesting a *proposed* termination of utility service." The issue in *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985), was what "form of pretermination hearing" satisfies due process; it was a given that pretermination *notice* is required.

legislative position[13] as an "obligation of a member to designate which activities or issues he or she believes to be nonchargeable." The Bar thus again, *see supra* pp. 11-12, reveals that its scheme shifts to the individual the burden of initially determining which activities are chargeable or not, despite this Court's holding that "[b]asic considerations of fairness, as well as concern for the First Amendment rights at stake," dictate that organizations collecting compulsory fees under color of law bear that burden, not the individual potential objector. *Hudson*, 475 U.S. at 306; *accord Schneider*, 917 F.2d at 634-35; *see Keller*, 110 S. Ct. at 2237.

Placing that burden on the Bar, and permitting general objections, is not "unfair" to members who support its political agenda, as Respondents' Brief at 17 complains. It is simply the price that the Constitution requires them to pay for choosing to fund that agenda through mandatory dues rather than voluntary contributions. *See Tierney*, 824 F.2d at 1503 n.2; *Florida Bar Re Schwarz*, 552 So. 2d 1094, 1098 (Fla. 1989) (McDonald, J., dissenting), *cert. denied*, 111 S. Ct. 371 (1990).

Nor can the burden be shifted to the potential dissenter because the Bar wants to know "how many members have objected to a particular position" in order "to rationally judge whether arbitration is economically or ideologically justified." Respondents' Brief at 18. That is merely yet another form of the argument, repeatedly rejected by this Court, that administrative convenience and cost alone justify denying constitutional rights. *See supra* pp. 6-7, 11-12. Moreover, procedural safeguards required by the first amendment cannot be dispensed with on the ground that the number of those whose constitutional rights are at stake might be small, or that the Bar (arrogantly) views their objections as "in bad faith" or "ideologically weak": "the Constitution protects expression and association without regard to * * * the truth, popularity, or social utility of the ideas and beliefs which are offered." *NAACP v. Button*, 371 U.S. at 444-45.

[13] The Florida Supreme Court reaffirmed its approval of this requirement in *Florida Bar Re Frankel*, No. 76,853 (June 13, 1991).

Under *Hudson*, 475 U.S. at 306 n.16 (emphasis added), and thus under *Keller*, the individual's "'burden' is *simply* the obligation to make his objection known." Implicit in that holding is the principle first stated in *Allen*, 373 U.S. at 118, that it "would be impracticable to require a dissenting employee to allege * * * each distinct union political expenditure to which he objects." The Court found "strong reasons for preferring the approach of *Allen*" as a constitutional rule in *Abood*, 431 U.S. at 239 n.39, 241. The Bar gives no sound reason for overruling that conclusion.

The first ground on which *Abood* relied is that specific objections disclose "the specific causes to which an individual employee is opposed (which necessarily discloses, by implication, those causes the employee does support)." *Id.* at 241 & n. 42. The Bar merely contradicts the Court, without saying so, arguing that a specific objection discloses "only a belief that the issue is outside the scope of chargeable use of compulsory dues." Respondents' Brief at 19-20. However, if an attorney submits objections to less than all of the political and ideological positions taken by the Bar, he is saying that he does not want to fund voluntarily those positions in particular. The only reasonable inference is, as *Abood* concluded, that he disagrees with the Bar's positions on those issues. Denying that member the right to object generally thus compels him to expose himself to potential hostility or reprisal, *see Abood*, 431 U.S. at 241 n.42, or to continually monitor the Bar's twice-monthly publication to avoid those possible consequences by submitting specific objections to all of the Bar's positions.

That "burden of monitoring all of the numerous and shifting expenditures * * * that are unrelated to" a union's chargeable functions is the second ground on which *Abood*, 431 U.S. at 241, held that only a general objection can be required. The Bar illogically argues that requiring specific objections "places no greater monitoring burden upon the petitioner than he would have if he were permitted to make a general objection." Respondents' Brief at 15. That is simply not true. If the Bar made the type of disclosure required by *Hudson* at the beginning of the dues year, no further monitoring would be necessary. An

attorney could pay full dues, if he did not object to any of the expenses disclosed; make a simple general objection and pay the reduced fee calculated by the Bar, if he believed that the Bar's allocations were reasonable; or make an objection and request arbitration at which the Bar would have the burden of justifying its calculation, if he questioned the Bar's allocations. *See, e.g., Schneider*, 917 F.2d at 635 n.22; *Lehnert*, 707 F. Supp. at 1496-97.

Thus, "the requirement that the Bar provide members with reasonably detailed information regarding the breakdown of expenditures prior to the member having to file an objection" is *not* "implicitly based upon the assumption that the member requires the information in order to make a rational decision regarding objection on an issue-by-issue basis," as Respondents' Brief at 20-21, asserts. Rather, it is based on the conclusion that "an adequate accounting * * * enables a non-consenting [individual] to intelligently appraise what proportion of his dues would be allocable to" chargeable and nonchargeable activities, *Tierney*, 824 F.2d at 1504, and "to enter an intelligent and informed [general] objection to the use of his [dues] if he desires." *Damiano*, 830 F.2d at 1370; *see Hudson*, 475 U.S. at 306-07 & n.18. It also "prevents unnecessary objections and gives objectors sufficient information to carry on a meaningful challenge in the arbitration process." *Jibson*, 719 F. Supp. at 606.

Moreover, a disclosure which explains what kinds of political and ideological positions the Bar has taken, *see supra* p. 11, would also assist members in making specific objections if they do not want to object generally. A *requirement* of specific objections is not necessary to protect those hypothetical members who want to support some, but not all, of the Bar's political activity, as Respondents' Brief at 18-19 suggests. *Permitting* general objections precludes neither specific objections nor voluntary contributions to support particular Bar programs even after a general objection has been made.

IV. GIBSON'S CLAIM FOR A REFUND WAS CONCRETELY RAISED IN THE DISTRICT COURT, AND HE REQUESTS ONLY A REMAND FOR A DETERMINATION OF THAT CLAIM

The Bar concedes, as it must under *Abood*, 431 U.S. at 241-42 & n.43, that the prayer for all relief to which he is entitled included in petitioner Gibson's complaint was sufficient to constitute a claim for refund of that part of his compulsory dues used by the Bar in the past to fund constitutionally nonchargeable activities which he challenged. Respondents' Brief at 26. However, the Bar grossly misrepresents the record when it says that "a proposed amendment to the Florida Constitution in 1984" was "the only issue which he challenged." *Id.* at 25 & n.21.

Mr. Gibson's complaint alleged that the Bar "espouses and makes known its view *on many political positions* and actively lobbies for the same and the costs of such activities are funded by the dues which its members are required to pay." J.A. 9 (emphasis added). Consistent with that allegation, his case was stated in the Pretrial Stipulation at 1 (R.17) (filed Aug. 17, 1984) (emphasis added) as that "use of compulsory Bar dues is prohibited for *advocacy of any views in areas designated by this Court as being outside the scope permitted by the First Amendment*." Both the district court and court of appeals consequently found that Mr. Gibson presented a claim against *all* constitutionally nonchargeable political and ideological activities in which the Bar engages, not just opposition to the 1984 Florida constitutional amendment, or even just its legislative lobbying. P.A. 26a, 38a-39a. Indeed, the court of appeals acknowledged that his complaint encompassed the Bar's publications and public relations activities "[i]n addition to traditional legislative lobbying." P.A. 25a n.1.

The Bar also totally misrepresents the record by saying that Mr. Gibson only "mention[ed] the issue of damages on several occasions in the trial court, but never under circumstances calling for a response by the Bar or specific action by the trial court." Respondents' Brief at 26. As Petitioner's Brief at 24 details, on *four* separate occasions on remand from the court of appeals' first

decision, Mr. Gibson concretely raised his right to a hearing on the refund issue as a ground for granting his motion for an injunction *pendente lite* and for denial of the Bar's motion for final judgment.[14] Thus, Mr. Gibson *did* call for "specific action by the trial court." The Bar responded by arguing in its Reply Memorandum on Motion for Judgment at 2, 5 (filed Dec. 16, 1986) (R.47) that its adoption of procedures purportedly complying with *Hudson* was the only remedy to which Gibson was entitled and that eleventh-amendment and qualified immunity barred any refund. And the district court took "specific action" in response to Mr. Gibson's argument: it denied him the requested hearing by erroneously dismissing the case on the ground that "no further proceedings are required." P.A. 22a-23a.

Admittedly, the record is insufficient for this Court to determine the refund to which Mr. Gibson is entitled, if any, as Respondents' Brief at 25-26 points out. However, that is because the district court precluded the necessary record by erroneously dismissing the case. As a result, the Bar was never held to its burden of proving the proportion of its past expenditures that are constitutionally chargeable. *See Lehnert v. Ferris Faculty Ass'n*, 111 S. Ct. 1950, 1962 (1991). Neither did the parties brief nor the lower courts determine which bar activities meet the test set out in *Keller*. However, all that Mr. Gibson asks is that the Court reverse the erroneous dismissal of his action and remand the case for further proceedings in which the Bar would be put to its burden of proof and the necessary determinations would be made by the district court. When the Bar's misrepresentations of the record are discounted, Respondents' Brief at 24-26 concedes as much: "he may be entitled to have the question heard, but not at the appellate level."

Respondents' Brief abandons the Bar's argument that Mr. Gibson's claim for a refund is barred by the eleventh amendment.

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[14] Indeed, he went further than necessary, given the fact that the burden of proof on the issue is on the Bar, *see Lehnert v. Ferris Faculty Ass'n*, 111 S. Ct. 1950, 1962 (1991), by presenting evidence of some of the political and ideological positions taken by the Bar. *See* J.A. 18-24, 32-37.

However, eleventh-amendment immunity is a "jurisdictional bar." *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984). Thus, this Court can consider the question *sua sponte*. And if it does not decide the issue, the Bar could reassert that invalid defense on remand. Because both sides have briefed the issue, Opposition to Certiorari at 8-9; Petitioner's Brief at 25-26, and because *Keller* forecloses the Bar's argument as a matter of law, the Court should settle the issue now to avoid possible further unnecessary litigation.[15]

CONCLUSION

The Court should reverse the decision of the court of appeals and grant all relief requested by petitioner.

Respectfully submitted,

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[15] *Amicus* Wisconsin Bar raises two defenses not briefed by the parties: an argument that *Keller* should not be applied retroactively, Wis. Bar's Brief at 6-9; and qualified immunity, *id.* at 9-11. Its retroactivity argument is bootless after *James B. Beam Distilling Co.*, 59 U.S.L.W. 4735 (U.S. June 20, 1991) (No. 89-680). Whether qualified immunity is available to a private party acting in concert with the state, which is what the Bar is under *Keller*; and whether it applies to equitable restitution (as opposed to civil damages), which is what the claim here is, *see Bowen v. Massachusetts*, 487 U.S. 879, 891-96 (1988), are both questions which this Court has left open and should be determined first on remand. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 942 n.23 (1982); *Harlow v. Fitzgerald*, 457 U.S. 800, 819 n.34 (1982). The Wisconsin Bar's third argument, that annual "contemporaneous objection" is a prerequisite to restitution, Wis. Bar's Brief at 12-13, is frivolous. Even if Mr. Gibson only "first made known [his] objection to [the Bar's] political expenditures in [his] complaint filed in this action, • • • this was early enough." *Allen*, 373 U.S. at 119 n.6. The Bar was "without power to use payments thereafter tendered by [him] for such political causes." *Machinists v. Street*, 367 U.S. 740, 771 (1961).